Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., *et al.*,

Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

REPLY BRIEF FOR APPELLANTS

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The central issue in this case is whether either one of two parts of the election process -- setting an election date, and requiring candidates to file

within specific dates in order to run in that election--is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," within the meaning of section 5 of the Voting Rights Act.

The district court held against coverage, despite this Court's repeated decisions giving section 5 the broadest possible coverage. With no discussion or supporting authority, the district court named these events "steps in the implementation of a new statute," "administrative actions," and "ministerial acts" (J.S. 8a-9a), and decided that these characterizations took these critical events outside the reach of section 5.

The United States points out, however, that the Attorney General regards both changes as covered by section 5, and

his administrative practice has consistently done so. Brief for the United States as Amicus Curiae Supporting Appellants, pp. 13-15. That view is entitled to deference. Blanding v. DuBose, 454 U.S. 393, 401 (1982); see also McCain v. Lybrand, 104 S.Ct. 1037, 1049 (1984).

As to the change in the election date, the appellees concede that such a change is ordinarily covered by section 5: "None of the appellees, including these appellees, disputes that a change in an election date effected by legislation is a covered change; ..." Brief for the School District appellees, p. 27; see also Brief for the Election Commission appellees, p. 35. They are thus forced to argue that the form of a voting change is decisive, an argument which has been clearly

foreclosed since this Court's first section 5 case, Allen v. State Board of Elections, 393 U.S. 544 (1969)(bulletin issued by State Board of Elections covered by section 5). The appellees also argue that in setting a new election date they were simply trying to comply with the law once preclearance was obtained, but that is assuredly not a reason to skip section 5 scrutiny for the date selected.[1] As Congress recently reiterated, "even when changes are made for valid reasons, for

[1] At page 33 of their Brief, the Election Commission appellees point out that Busbee v. Smith held, in circumstances like these, that the state could postpone the election "until the earliest practicable date." 549 F. Supp. 494, 525 (D.C.C. 1082), aff'd, 459 U.S. 1166 (1983). What the appellees do not say is that when the state moved to select the "earliest practicable date" for a rescheduled election, that date had to be submitted for section 5 review and was in fact objected to by the Attorney General, necessitating its cancellation. 549 F. Supp. at 920-21

example, reapportionment or home rule, 'jurisdictions may not always take care to avoid discriminating against minority voters in the process.'" S. Rep. No. 97-417, p. 12 n.31 (1982), quoting Mc Daniel v. Sanchez, 452 U.S. 130 (1981).

As to the selection of a candidate filing period for the newly scheduled March election, that selection too--made in January 1983--was a change notwithstanding that the dates chosen were the same as those designed for a November election. The Attorney General takes this position and also indicates that his preclearance of Act 549 did not preclear the selection of a filing period for a March election. Brief for the United States, 19-20.

Moreover, the date selected enforced a filing period which had illegally taken place six months earlier at a time when

the statute was unenforcible because there was no preclearance. Following the district court's view, J.S. 8a-9a, the appellees repeatedly assert that holding the filing period before preclearance was simply an election preparation and did not constitute "enforcement" or "implementation" of a change. See, e.g., Brief for Election Commission appellees, pp. 8-9, 18, 19; Brief for the School District appellees, p. 13.[2] In fact, though, a

[2] The appellees note that Act 549 authorized no period for filing by candidates other than August 16-31, 1982, as if to say that the lack of statutory authority compelled them to use that period only. But the lack of specific statutory authorization was obviously no bar to setting a fresh election date without specific statutory authority. Appellees also suggest, Brief for Election Commission appellees, p. 4, that their two and one-half month delay in submitting Act 549 to the Attorney General was prompted by their waiting for the referendum to be held, even though the Section 5 regulations explicitly authorize submitting such a change before completion for the referendum. 28 C.F.R. §51.20.

filing period constitutes very real enforcement because once the qualification period closes, voters will be prevented from casting ballots for anyone who has not filed during that period--as happened in this case. Recognizing this reality, the cases have held that holding candidate qualifying periods before preclearance violates section 5, and in one of the recent cases a stay of an injunction was refused by two justices of this Court. Busbee v. Smith, C.A. No. 82-0665 (D.D.C. May 24, 1982), stay denied, A-12018 (May 25, 1982)(Burger, C.J.), reapplication for stay denied, A-1018 (June 1, 1982)(Rehnquist, J.), cited in Busbee v. Smith, 549 F. Supp. 494, 497 n.1 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1963). See also South Carolina v. United States, 585 F. Supp. 418 (D.D.C. 1984). These cases are consistent with the terms of section 5

which require not simply submission but timely submission, meaning submission before implementation. Congress has recently emphasized the importance of the timeliness requirement by repeated references, cited in our main Brief, during the consideration of the Voting Rights Act in 1982. See also S. Rep. No. 97-417, p. 47 (1982) ("Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law.")[3]

[3] The rule against premature enforcement is not simply symbolism. Enforcement of unprecleared changes imposes a real burden on those who are forced to choose between complying with an unprecleared voting change (often at great inconvenience or prejudice) and relying on the Voting Rights Act to one's detriment. The prejudice is especially great when an unprecleared candidate filing period is allowed to go forward. If there is a danger that the filing period will be enforced, notwithstanding the lack of preclearance, candidates forced to choose which offices to file for may find themselves--and their supporters--severely prejudiced by later events.

Finally, the appellees argue, following the district court, that if requiring candidates to file under Act 549 before preclearance was illegal, the illegality was nullified by the Attorney General's subsequent preclearance. But Congress has emphasized that section 5 has both a substantive requirement (changes must be non-discriminatory) and a procedural requirement (changes must be precleared before they can be implemented), and in the most recent extension of section 5 Congress explicitly said that subsequent preclearance does not undo a violation arising from premature implementation. See S. Rep. No. 94-417, p. 48 (1982), quoted at p. 42 of our main Brief. The appellees cite several cases, including Berry v. Doles, 438 U.S. 190 (1978), in which courts have held that a subsequent preclearance can be a factor to take

into account when a court is deciding on the relief for a violation. None of those cases remotely holds that a subsequent determination by the Attorney General that a particular voting change is non-discriminatory eliminates the procedural violation. Nor could any case so hold, in light of Congress' concern about non-submission and Congress' explicit statements addressed to that problem.[4]

[4] We believe the United States agrees with this view. At one point the Solicitor General does refer to instances in which "the Attorney General has extended retroactive clearance to a belatedly submitted change that had already been put into effect." Brief for the United States as Amicus Curiae Supporting Appellants, p. 21 n.15 (second sentence). To the best of our understanding, that sentence refers only to the fact that a voting change which is prematurely implemented does not thereby become ineligible for preclearance in its prospective applications. Whether a premature implementation calls for an order requiring the act (e.g. an election) to be redone legally is a question of relief for an equity court--if a suit is brought--and we know of no authority to suggest that the Attorney General's preclearance can be "retroactive" in the sense of making premature implementation legal.

In this case, any voter who wished to exercise the right to vote had to vote on an unprecleared election date, and could vote only for candidates who had qualified during an unprecleared filing period. Both these requirements directly contravened the explicit words of section 5, which provides that "unless and until" there is preclearance "no person shall be denied the right to vote for failure to comply with such voting qualification or prerequisite, or standard, practice, or procedure with respect to voting."

This case involves no more than variations on the same questions of section 5 coverage which have been repeatedly answered by Congress and this

Court. The answers are the same here, and the district court's decision that section 5 was not violated should be reversed.

CONCLUSION

For the above reasons, the decision of the district court should be reversed.

Respectfully submitted,

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